Supreme Court, U.S.
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No. 02-149

IN THE
Supreme Court of the United States

SPANISH COVE SANITATION, INC.,
Petitioner,

v.

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Kentucky Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. PETITIONER MISSTATES THE RECORD IN ASSERTING THAT THE KENTUCKY SUPREME COURT HELD THAT PETITIONER'S CLAIMS WERE NOT RIPE.

Petitioner's sole argument is that the Kentucky Supreme Court erred in holding that Petitioner's "takings" claims were not ripe, yet proceeded to find that the dismissal of said claims with prejudice was appropriate. There is no language in the opinion to indicate that the Kentucky Supreme Court made any finding that the Petitioners "takings" claims were not ripe. To the contrary, upon review of the opinion, it is quite apparent that the Kentucky Supreme Court considered and ruled on the merits of Petitioner's claims only *after* recognizing that the claims were indeed ripe for review.

The key language begins with the Kentucky Supreme Court explaining that it had earlier denied transfer of this case from the Kentucky Court of Appeals "because the taking had not actually occurred at the time the suit was filed and a judgment dismissing the claim was entered."[1] *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District, Ky., 72 S.W.3d 918, 920 [footnote added].* However, the opinion goes on to state that, "the Court of Appeals held that the trial court had dismissed the case 'with prejudice' and such a dismissal would operate to foreclose [Petitioner] from presenting the case when the taking actually did occur. [FN3]" *Id.* Footnote 3 of the opinion states, "The

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[1]When the Kentucky Court of Appeals requested that the Kentucky Supreme Court accept transfer of the appeal, Respondent had not physically tied its sewer line into the treatment plant owned by Petitioner, making all the claims prospective, based on Petitioner's belief that Respondent's alleged "taking" was imminent.

parties have indicated that this has since happened." *Id.* Thus, it is clear that the Kentucky Supreme Court was cognizant of the fact that Respondent had actually committed the alleged "taking," making the merits of Petitioner's claims ripe for adjudication. Furthermore, it is telling that the Kentucky Supreme Court accepted discretionary review of this case only after it learned that the physical act constituting the alleged "taking" had actually occurred, when it had earlier refused to grant transfer specifically because such act had not occurred.

It would appear that Petitioner has arrived at its conclusion that the Kentucky Supreme Court made a holding that the case was not ripe for review based on the following language from the opinion: "At the outset, we should note that the trial court did not abuse its discretion in determining that the issue was not ripe." This sentence, just as it says, is merely a note; not a holding. The opinion goes on, in the same paragraph, to state:

> we [have] held that Kentucky courts cannot grant advisory opinions or rule on hypothetical questions, but rather must rule on real disputes. *At the time this action was filed, nothing had even arguably been taken.*

Id. at 921. [emphasis added]. Immediately following this quote, the Kentucky Supreme Court proceeded with a discussion of the viability of Petitioner's claims, ultimately concluding that summary judgment was appropriate as Kentucky law provided Petitioner with no cause of action based on the facts as they existed at the time of the opinion.[2] Under

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[2] The last sentence of the Kentucky Supreme Court opinion states, "therefore we affirm the Court of Appeals in its opinion that the trial court properly granted **summary judgment** in favor of [Respondent]."(emphasis added). The Kentucky Court of Appeals had held, "[i]n short, [Petitioner] had no cause of action against [Respondent] because it was entitled to no

Calvert Investments, Inc. v. Louisville and Jefferson County Metropolitan Sewer District, et al., 847 F.2d 304, 308 (6th Cir. 1988), Petitioner's "unilateral expectation" of continued operation is not a property right subject to a "taking." Based on the above, it is clear that the Kentucky Supreme Court was well aware that it could not properly uphold *a summary judgment*, as opposed to a *dismissal*, in this case until it found that the claims were ripe. This is strong support for the conclusion that the Kentucky Supreme Court merely noted that at the time the matter came before the trial court, it was not ripe for adjudication. It does not follow, as Petitioner contends, that the Kentucky Supreme Court based its holding on a similar determination. Moreover, in considering the opinion in its entirety, there is nothing to indicate that the Kentucky Supreme Court found that Petitioner's claims were not ripe at the time it considered the matter. Having determined that the matter was ripe for review, it was entirely proper for the Kentucky Supreme Court to consider the viability of Petitioner's "takings" claims.

Petitioner has made only one argument to support its Petition for Writ of Certiorari; that the Kentucky Supreme Court had no subject matter jurisdiction to dismiss Petitioner's federal constitutional claims with prejudice once it made a determination that the issues were not ripe. The Kentucky Supreme Court has made no such determination. In fact, as Petitioner repeatedly requested, the Kentucky Supreme Court considered the merits of Petitioner's claims, and ruled against Petitioner. Having lost on the merits, Petitioner has twisted the record to argue that all of the decisions against it have been based only on the ground of ripeness, and it should get yet

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compensation under Kentucky law." Thus, the Kentucky Supreme Court opinion affirms the Kentucky Court of Appeals opinion which had upheld summary judgment, not on a finding that the matter was not ripe, but on a finding that Kentucky law provided Petitioner no remedy.

another bite at the apple. Neither the record nor the law supports such a contention and, therefore, the Petition for Writ of Certiorari should be denied.

II. THERE IS NO COMPELLING REASON FOR THIS COURT TO ACCEPT CERTIORARI IN THIS CASE AS NO IMPORTANT FEDERAL QUESTION IS INVOLVED.

Petitioner's claim of error in this case is that the Kentucky Supreme Court dismissed its federal constitutional claims, with prejudice, after having found that the matter was not ripe for adjudication. As explained above, Petitioner's assertion that the Kentucky Supreme Court made a finding that the matter was not ripe is unfounded. However, even if Petitioner's claim of error had merit, such claim does not involve an important federal question and the Kentucky Supreme Court ruling in this case would result in neither broad nor serious adverse effects.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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